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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, A. D. 1940**

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**No. ~~708~~ 32**

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ALFRED E. ROTH,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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ALFRED E. ROTH,
*Pro Se.*

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## REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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Replying to point I of the argument (Br. in Opp. 10), preliminarily petitioner desires to state to this Court that foot note 4 p. 13 of the Government's brief in opposition to the effect that he does "not contend that the indictment was not in fact returned in open court" is untrue.[1]

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[1] Paragraph 3, of the motion to quash indictment (R. 142) states as follows: "Also come said defendants, and each of them and move the Court to set aside and quash the indictment herein against them and each of them on account of and because the said indictment was not properly returned in open court and because the said indictment was filed without the proper order of court directing the receiving and filing of said indictment."

The Government (Br. in Opp. 13) states: "It is evident that this notation [2] explicitly identifies the indictment in the instant case as one of the four indictments returned by the grand jury in open court." If this sophomoric conclusion was drawn by anyone other than the Solicitor General of the United States, it would require no answer. Since he has done so, petitioner respectfully requests this Court to re-examine foot note 2 of this reply which will conclusively show that the notation does neither explicitly or otherwise identify "the indictment in the instant case as one of the four indictments returned by the grand jury in open court."

The Government (Br. in Opp. 11) states: "On the face of the indictment in the clerk's own handwriting (See R. 1119) appears the statement 'Filed in open court this 29th day of Sept., A. D. 1939, Hoyt King, Clerk,' * * *." The record reference is to the opinion of the Circuit Court of Appeals which is the basis for the present petition for certiorari and therefore, it is respectfully submitted, should not be cited as authority to show the state of the record in the District Court. There is nothing in the record to show that the notation referred to is in the handwriting of the clerk. As a matter of fact record 38 which contains the notation is a transcript of the face of the manuscript cover furnished by the government printing office which contains as part of the printed matter "Filed in open court".[3] It is obvious therefore, that the statement by the Circuit Court of Appeals and the Government is incorrect.

The Government contends (Br. in Opp. 11) that there is no proof in the present record that the indictment was not returned in open court. This contention is untenable for the reason that the burden is on the record to show that it

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[2] "The Grand Jury return 4 Indictments in open court. Added 10/30/39" (R. 39).

[3] U. S. Government Printing Office Form No. 195.

was returned in open court, otherwise the provisions of Amend. V of the U. S. Constitution would be nullified.

Finally the Government argues (Br. in Opp. 14) "The defect was, at most, formal • • •." An identical contention was rejected in *Renigar* v. *United States*, 172 Fed. 646, 655.

Government's point III (Br. in Opp. 18) in attempting to meet petitioner's contention that he was tried by a packed jury (Br. in Opp. 20), states: "• • • petitioners have failed by their bill of exceptions to disclose what transpired on their motion for a new trial. There is, therefore, nothing to show the factual situation presented to the trial court or the grounds upon which that court may have predicated its decision."

The Government in an endeavor to have this Court deny the petition for certiorari tries by the above to import into the record a factual situation which does not and did not exist. The motion for a new trial based on the affidavits filed on April 23, 1940 (R. 1049-1057) was by the trial judge without hearing or argument summarily overruled on April 23, 1940 (R. 1046, 1057, 1059).

The Government tacitly agrees that petitioner's contention is well taken when it states (Br. in Opp. 21): "• • • no organization or group may be allowed to dictate to them [clerk and jury commissioner] what names should be placed in the box and they may not systematically exclude any qualified class • • •." In the instant case a group prepared and presented a list of names all of which were placed in the box (R. 1050, 1057). This left the jury commissioner and the clerk of the court with no function at all.

The Government, though referring to the affidavits filed by petitioners Glasser and Roth (Br. in Opp. 23) states: "It is, moreover, of significance that neither below nor here is it asserted that any women who attended the jury classes

of the Illinois League of Women Voters served on the jury which tried and convicted the petitioners."

Obviously this is an attempt by the Government to confuse the issues since the affidavit of the petitioner states (R. 1057): "* * * that the female jurors empanelled to try the case of United States *vs.* Glasser, et al., were selected from the said list to the exclusion of all other females;" and Glasser's affidavit states (R. 1050): "* * * that all the names of the females placed in the box were presented to the clerk of said court * * * by the Illinois League of Women Voters * * * that the persons selected by said league for presentation to the clerk aforesaid had previously been required to and did attend jury classes maintained for the purpose of giving instructions to potential jurors."

Point V of the Government (Br. in Opp. 27-28) in meeting the contention of the petitioner that the indictment is vague and indefinite, seems to urge that the granting of a bill of particulars will cure such a defect, and, as this was done in the instant case, there is no cause for complaint. But, the failure of an indictment to define an offense with precision cannot be cured by a bill of particulars. *Jarl* v. *United States,* 19 F. (2d) 891 (C. C. A. 8). A bill of particulars does not give validity to a void indictment. *Gerson* v. *United States,* 25 F. (2d) 49 (C. C. A. 8).

The Government in its statement of the history of the case and the facts (Br. in Opp. 3-10) sustains the contention of the petitioner that he is a lawyer to whom Kretske referred a few cases for trial (R. 805) as many other lawyers did (R. 749, 796, 889, 890).

The Government states (Br. in Opp. 5): "Petitioner Roth was an attorney in private practice (R. 833) to whom Kretske referred various persons who were charged with violations of the liquor laws and whose cases were involved

in the instant conspiracy." It is not denied that Kretske referred trial work to the petitioner in a few of the cases.[4]

The Government states (Br. in Opp. 7): "* * * and that Kretske would furnish a lawyer * * *." Government witness Dewes who engaged Kretske testified "He (Kretske) said he would give me a lawyer * * *" (R. 543). All that this proves is that Kretske referred a case to the petitioner for trial.

The Government states (Br. in Opp. 8): "In many of these cases Kretske arranged for Roth to act as the attorney for the defendants (R. 228, 230, 273, 302, 345, 546, 835, 861, 872, 874, 875, 878)." Again all that this proves is that the petitioner acted as attorney in cases referred to him for trial. Petitioner desires, however, to point out that the cases are not as many as the record references seem to indicate. R. 228, 230, 273, 345 and 835 are to one and the same case, namely, the *Elmer Swanson, Anthony Hodorowicz,* and *Clem Dowiat* case. This case was at the request of the alcohol tax unit stricken with leave to reinstate (R. 918-920). Petitioner prepared for and was ready to go to trial in this case (R. 235-236). R. 302 refers to the *Frank Hodorowicz, Mike Hodorowicz, Peter Hodorowicz* and *Clem Dowiat* case. The Government is incorrect in stating that Kretske arranged for Roth to act as attorney in this case. The petitioner was engaged directly by Frank Hodorowicz and later discharged by him and another lawyer substituted (R. 859). R. 546 and 878 refer to the case of Edward Dewes who was tried and convicted (R. 858). R. 861 refers to the case of Harry Dukatt who entered a plea of guilty and was sentenced (R. 700). R. 872 and 874 have reference to the same case, the Chrysler Sedan, which was

[4] It was during the time Kretske was in private practice that he referred cases to the petitioner for trial. The first case referred was January 1938 (R. 834).

ordered returned to the claimant by District Judge Barnes after hearing the case on the report prepared by the alcohol tax unit (R. 718). R. 875 is a repetitious reference to the *Swanson, et al., Dukatt* and *Chrysler Sedan* cases.

The conversation with Alexander Campbell, inadmissible under any theory, referred to (Br. in Opp. 10) where the Government states that the petitioner attempted to prevent the return of a certain indictment in the Northern District of Indiana is thoroughly contradicted and impeached. The certain indictment referred to was returned in Indiana April 25, 1938 (Exhibit 186A). Edward Wroblewski one of two brothers named as defendants therein testified as follows: "In April 1938 we got a call that we should set ourselves up on bond, that we have a conspiracy case coming up in Indiana. Tony Horton made our bond" (R. 635). Edward Wroblewski further testified he first met and hired Roth when he was preparing his case for trial in Indiana which was a year and a half after April 1937 (R. 676-677) which would fix the time as September 1938.

Petitioner, at Chicago examined the United States Commissioner's removal file (Exhibit 186) and a certified copy of the Indiana indictment (Exhibit 186A) after he was engaged in September 1938 and before he went to Indiana (R. 838-840).

Alexander Campbell testified that the first conversation he had with the petitioner was September 30, 1938 (R. 680). Does it seem reasonable that the petitioner would try to prevent the return of an indictment five months after it had already been returned and the defendants under bond, all of which was known to the petitioner? The petitioner related the conversation had wherein he requested a copy of the indictment and asked to be advised when to appear in court (R. 842). A letter from and signed by Campbell,

dated October 7, 1938, was received by the petitioner complying with his request[5] (R. 842).

It would unduly lengthen this reply to set out additional correspondence from Campbell contradicting his own testimony from which further argument can be made to meet the contention that the petitioner attempted to prevent the investigation in the instant case. It will be done in the event the petition for certiorari is granted.

The petitioner has reviewed substantially all the evidence of the Government against him as to each case he handled (Pet. Br., 5-9). The Government has not seen fit to comment on a single one other than generally, that the petitioner appeared as attorney in cases referred to him by Kretske.

Certainly there is some protection in the law from the snare of guilty inferences as against innocent ones that may be drawn from the same facts and circumstances.

The road for an attorney is increasingly a difficult one and there are some who view his every action with suspicion. When one has been in the profession for years and has gained a reputation for integrity by many lawyers engaging him in his field, it is such unfortunate occurrences as the present one that emphasizes the fact that one may lose the fruits of those years of honest labor by being placed in a hostile and prejudicial atmosphere by the evidence permissible under a drag net type of indictment and subjected to vicious inferences.

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[5] The body of the letter is as follows:

"In re: *U. S.* v. *Edward Wroblewski, et al.*, Hammond Criminal 1015.

"DEAR SIR:

"Inclosed please find copy of indictment in above captioned matter.

"This being a Hammond Division case, it will be up for trial during the Hammond sitting of the Federal Court which will begin on November 9.

"If there is any other information you desire it will be agreeably furnished." (Exhibit 137 Orig.)

There was no evidence that this petitioner conspired with anyone to defraud the United States of the conscientious services of Glasser or anyone else, on the contrary the evidence vindicates him.

## Conclusion.

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED E. ROTH,
*Pro se.*

March 27, 1941.